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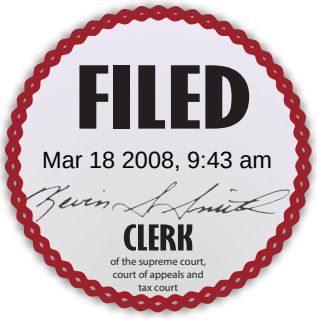

IN THE
COURT OF APPEALS OF INDIANA

LORI (FAUST) MONTGOMERY,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 85A02-0707-CV-644
	)	
DENNIS FAUST,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen III, Judge
Cause No. 85C01-0607-DR-314

March 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Lori (Faust) Montgomery (Wife), appeals the trial court's division of property arising from the dissolution of Wife's marriage to Appellee-Respondent, Dennis Faust (Husband).

We reverse and remand with instructions.

ISSUES

Wife raises three issues on appeal, which we combine and restate as the following two issues:

(1) Whether the trial court abused its discretion in determining what property to include in the marital estate; and

(2) Whether the trial court abused its discretion in dividing the marital estate.

FACTS AND PROCEDURAL HISTORY

Husband and Wife were married on May 12, 2003. Wife had two children from a previous marriage who lived with the couple. On July 6, 2006, Wife filed a petition for dissolution of marriage. On January 31, 2007, the trial court entered its Final Decree of Dissolution (Final Decree). In a footnote, the trial court wrote:

> While the division is intended to be substantially equal, due to the short duration of the marriage, the [c]ourt is setting off to each that property which they possessed and brought into the marriage and dividing equally only what was acquired during the marriage. Such set offs are reflected by an "x" in the respective columns.

(Appellant's Br. p. 18). The property set off to Husband included 9.72 acres of land on Dora Road in Wabash, Indiana (Dora Road property), which had been appraised at a value of $42,500, and a Chevrolet truck. The trial court also set off approximately 170 other items of

personal property apparently owned by the parties before the marriage. Furthermore, the trial court excluded from the marital estate a profit sharing check of $2,281.83 received by Husband on August 25, 2006. Finally, the trial court assigned to Wife all of the medical bills incurred during the marriage by Wife and her children without considering the amount of those bills, which Wife alleged to be $2,500.

Wife now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Wife argues that the trial court erred in dividing the marital estate. In Indiana, the division of marital property is a two-step process. *Thompson v. Thompson*, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004), *reh'g denied, trans. denied*. First, the trial court must determine what property must be included in the marital estate, or marital pot. *Id*. Second, the trial court must divide the marital property under the presumption that an equal split is just and reasonable. *Id*. (citing Ind. Code § 31-15-7-5). Wife contends that the trial court erred both in determining the makeup of the marital pot and in dividing it.

Before addressing Wife's contentions, we note that Husband has not filed an appellate brief. When the appellee does not file a brief, we need not undertake the burden of developing an argument on the appellee's behalf. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006). Rather, the appellant needs only to present a case of *prima facie* error, which is defined in this context as "at first sight, on first appearance, or on the face of it."[1] *Id*. (quoting *Santana v. Santana*, 708 N.E.2d 886, 887 (Ind. Ct. App. 1999)).

[1] Although Wife's attorney may not have known that Husband would not file a brief, and therefore may not have known that this less stringent standard of review would apply, it is worth noting that she has failed to cite any standard of review whatsoever. Indiana Appellate Rule 46(A)(8)(b) provides, in part:

I. *Makeup of Marital Pot*

Wife argues that the trial court erred in determining the makeup of the marital pot. In Indiana, it is well-established that all marital property goes into the marital pot for division, whether it was owned by either spouse before the marriage, acquired by either spouse after the marriage and before final separation of the parties, or acquired by their joint efforts. I.C. § 31-15-7-4(a); *Hill v. Hill*, 863 N.E.2d 456, 460 (Ind. Ct. App. 2007). Wife maintains that the trial court erred by excluding the following: (1) the Dora Road property, the Chevrolet truck, and other personal property; (2) Husband's August 2006 profit sharing check; and (3) medical bills incurred during the marriage for Wife and her children.

A. *Dora Road Property, Chevrolet Truck, and Other Personal Property*

Wife first contends that the trial court erred in excluding the Dora Road property, the Chevrolet truck, and other items of personal property from the marital pot. We agree.

The "one-pot" theory insures that all assets are subject to the trial court's power to divide and award. *Hill*, 863 N.E.2d at 460. A systematic exclusion of marital assets from the marital pot constitutes an abuse of discretion. *McGinley-Ellis v. Ellis*, 622 N.E.2d 213, 219 (Ind. Ct. App. 1999), *summ. aff'd in pertinent part*, 638 N.E.2d 1249, 1253 (Ind. 1994). Here, the trial court, in a footnote in its Final Decree, wrote:

> While the division is intended to be substantially equal, due to the short duration of the marriage, the Court is setting off to each that property which they possessed and brought into the marriage and dividing equally only what was acquired during the marriage. Such set offs are reflected by an "x" in the respective columns.

"The argument must include for each issue a concise statement of the applicable standard of review[.]"

(Appellant's Br. p. 18). This amounts to a systematic exclusion of all of the parties' pre-marriage property. We have repeatedly and consistently stated that while the trial court may ultimately determine that a particular asset should be awarded solely to one spouse, it must first include the asset in its consideration of the marital estate to be divided. *See, e.g.*, *Hill*, 863 N.E.2d at 460; *Thompson*, 811 N.E.2d at 914; *Coffey v. Coffey*, 649 N.E.2d 1074, 1077 (Ind. Ct. App. 1995); *Ross v. Ross*, 638 N.E.2d 1301, 1303 (Ind. Ct. App. 1994) (citing *Lulay v. Lulay*, 591 N.E.2d 154, 156 (Ind. Ct. App. 1992)). More to the point, we have said that while the extent to which property was acquired by one spouse before marriage may serve to rebut the presumption of a 50-50 split, the entire value of that property must be included in the marital pot and divided by the trial court. *McGinley-Ellis*, 622 N.E.2d at 219 (discussing I.C. § 31-1-11.5-11, the predecessor to I.C. § 31-15-7-4). Wife has established *prima facie* error in this regard. *See Hurst v. Hurst*, 676 N.E.2d 413, 415 (Ind. Ct. App. 1997) (reversing division of property where trial court purported to make equal division but excluded piece of real estate owned by wife before marriage).

We acknowledge the trial court's reasons for setting off the property that it did: the short duration of the marriage and the fact that the spouses owned the property before the marriage. The length of the marriage is a proper consideration in determining the appropriate division of marital property. *See Bloodgood v. Bloodgood*, 679 N.E.2d 953, 957-58 (Ind. Ct. App. 1997); *see also In re Marriage of Adams*, 535 N.E.2d 124, 127 (Ind. 1989), *reh'g denied*. So, too, is the extent to which the property was acquired by each spouse before the marriage. I.C. § 31-15-7-5(2)(A). Nonetheless, as stated above, the "one-pot" theory insures that all assets are subject to the trial court's power to divide and award, *Hill*, 863 N.E.2d at

460, and a systematic exclusion of marital assets from the marital pot constitutes an abuse of discretion, *McGinley-Ellis*, 622 N.E.2d at 219. We must therefore remand this cause to the trial court with instructions to put all of the marital property, including property owned by Husband and Wife before the marriage, into the marital pot before determining the appropriate division.

B. *Husband's Profit Sharing Check*

Next, Wife argues that the trial court erred in excluding Husband's August 2006 profit sharing check from the marital pot. Wife has failed to persuade us on this point. As a general rule, "the marital pot closes on the day the petition for dissolution is filed." *Granzow v. Granzow*, 855 N.E.2d 680, 683 (Ind. Ct. App. 2006). Here, Husband received the check on August 25, 2006, more than a month after Wife filed the petition for dissolution on July 6, 2006. Still, Wife contends that it should be included in the marital pot because it "was *earned* prior to the filing of the petition for dissolution of marriage[.]" (Appellant's Br. p. 15) (emphasis added). However, to be included as marital property subject to division in dissolution property, such benefits, on the date the petition is filed, must not be forfeitable upon the termination of employment or must be vested. *See Granzow*, 855 N.E.2d at 684 (discussing pension benefits). This may be the case with Husband's August 2006 profit sharing check, but Wife has made no such showing. Wife has not established *prima facie* error with regard to the exclusion of Husband's August 2006 profit sharing check.

C. *Medical Bills*

Finally, Wife contends that the trial court erred by failing to consider the medical bills incurred by her and her children during the marriage when determining the value of the

marital pot. We agree. Marital property includes both assets and liabilities. *McCord v. McCord*, 852 N.E.2d 35, 45 (Ind. Ct. App. 2006), *trans. denied*. Therefore, in making a division of marital property, the court properly considers the separate property rights of the parties as well as all debts of the parties. *Id*. Here, the trial court simply assigned all of the medical bills to Wife by placing an "x" in Wife's column on the property distribution spreadsheet. On remand, in distributing the marital property, the trial court must factor in the actual amount of those medical bills, which, at least according to Wife's affidavit, is $2,500.

II. *Division of Marital Pot*

Wife also asks that we order the trial court to equally divide the marital estate on remand. This request is premature. The division of a marital estate is a matter within the sound discretion of the trial. *Smith v. Smith*, 854 N.E.2d 1, 5 (Ind. Ct. App. 2006). In other words, it is the role of the trial court, in the first instance, to determine the proper division of

the marital estate. We simply remind the trial court that it must do so in accordance with the principles established in Indiana Code §§ 31-15-7-4 and -5.

CONCLUSION

Based on the foregoing, we conclude that the trial court committed *prima facie* error in determining the makeup of the marital pot. We therefore remand this cause to the trial court with instructions to include all marital assets and liabilities in the marital pot, including the property owned by Husband and Wife before the marriage and the medical bills incurred by Wife and her children during the marriage, but excluding Husband's August 2006 profit sharing check.

Reversed and remanded with instructions.

KIRSCH, J., and MAY, J., concur.